

**United States Department of Labor
Employees' Compensation Appeals Board**

M.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Bernardino, CA, Employer**

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**Docket No. 14-1471
Issued: May 22, 2015**

Appearances:

*Stephen Millard, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 16, 2014 appellant, through her representative, filed a timely appeal from a January 24, 2014 merit decision and an April 17, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss and medical benefits effective January 24, 2014; and (2) whether it properly refused to reopen her case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted additional evidence on appeal. The Board is precluded from reviewing new evidence. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

FACTUAL HISTORY

On April 19, 2012 appellant, then a 53-year-old mail processor filed an occupational disease claim alleging that she sustained a back condition due to 25 years of repetitive activities such as repetitively lifting containers of mail weighing up to 40 pounds. She indicated that her back was hurting her on and off for more than five years and continuously since her fall at work on September 2, 2011.³ Appellant stopped work on September 8, 2011.

In a March 15, 2012 report, Dr. Glenn M. Ford, a family practitioner, diagnosed upper and lower back pain, lumbosacral spine sprain/strain, lumbosacral degenerative joint disease, depression (nonoccupational), and thoracic spine sprain/strain. He prescribed restrictions for limited duty.

In an April 19, 2012 report, Dr. Edward Mittleman, a family practitioner and treating physician noted appellant's history.⁴ He explained that her workplace activities caused her to be in a weight bearing position and to engage in twisting and lifting various weighted containers. These activities placed stresses upon appellant's vertebral axial skeletal system and resulted in chronic strain/sprain and tears of the supportive muscles/ligaments. Dr. Mittleman explained that, while she had degenerative lumbar changes, they were aggravated and accelerated by the constant twisting, lifting, pushing, and pulling of the lumbar tissues upon the bony vertebrae over a period of 25 years in her various clerical positions. He noted that appellant was asymptomatic in her back before her employment with the employing establishment and without any history of back injury or degeneration. Dr. Mittleman explained that changes in joint biomechanics were important to the pathogenesis of osteoarthritis/lumbar facet arthropathy and, once she began work for the employer her biomechanics significantly changed in response to her work duties. He opined that "bone formation (lumbar facet arthropathy/osteoarthritis) is one of the major components of the response of the skeletal system to the stress placed upon it by [appellant's clerical] duties." Dr. Mittleman indicated that, while appellant had a traumatic injury to the back on September 2, 2011, the lumbar sprain/strain was superimposed upon lumbar facet arthropathy (disc degeneration/osteoarthritis) which has been aggravated and accelerated by 25 years of work activities. He opined that she continued to suffer from her condition.

³ Appellant has a separate claim, File No. xxxxxx381, for a September 2, 2011 injury which is accepted for lumbar sprain, right hand sprain, and bilateral knee contusion. Her benefits under this claim were terminated on March 12, 2012. This claim has been doubled with the present claim.

⁴ Dr. Mittleman described the prior injury and explained that on September 2, 2011 appellant injured her low back walking toward empty bins. Her left foot tripped on a mat that had rolled up on the floor and she fell violently on her hands and knees. Appellant indicated that initially she had a minor contusion that later formed on the inside of her left knee. She appeared to feel otherwise unaffected by the fall and declined medical attention. However, Dr. Mittleman related that appellant soon began to have a gradual increase in pain and explained that, while she had a prior history of low back pain in 1987, her previous back pain had been lessening until the time of the accident. He noted that in the days after the fall, she began to have progressively increasing low back pain. Dr. Mittleman explained that appellant's prior symptoms due to her 1987 condition were in the midback region; whereas her current symptoms were in the low back. He diagnosed: aggravation/acceleration of lumbar facet arthropathy; chronic dorsal strain/sprain, and chronic lumbar strain/sprain.

In a June 1, 2012 report, Dr. Ford diagnosed thoracic spine strain, improved, lumbosacral degenerative joint disease, and lumbosacral spine sprain/strain. He indicated that appellant could return to modified work on June 1, 2012. Dr. Ford continued to treat appellant.

On July 20, 2012 OWCP accepted the claim for strain of back, thoracic region, and strain of back, lumbar region. It advised appellant that she could file a claim for compensation if the work-related condition caused her to lose time from work.

The record reflects that on and after April 19, 2012 appellant filed CA-7 claim forms for wage loss for certain claimed periods from March 14 to October 19, 2012.

In an August 3, 2012 report, Dr. Serge Obukhoff, a Board-certified neurosurgeon, noted appellant's history and described her work duties. He diagnosed thoracolumbar sprain and thoracic spondylosis. Dr. Obukhoff explained all symptoms started after a fall at work in September and, since that time, she had lower back pain. An August 14, 2012 lumbar magnetic resonance imaging (MRI) scan showed a normal lumbar curve associated with disc desiccation and thinning at L4 through S1 without evidence of spondylosis or spondylolisthesis; and facet arthrosis and a 0.5 centimeter broad-based protrusion at L4-L5 with mild disc edema.

On September 5, 2012 OWCP referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second medical opinion regarding whether her diagnosed conditions were employment related and if she had work-related disability. In a September 19, 2012 report, Dr. Ma described appellant's history and examined her. He advised that her accepted thoracic and lumbar sprains had resolved. Dr. Ma noted no abnormal objective findings with regard to these conditions. He noted that appellant stopped work on March 14, 2012 because the employing establishment was unable to accommodate her restrictions. Dr. Ma advised that the restrictions were due to degenerative spinal conditions which were not work-related conditions.

In an October 24, 2012 decision, OWCP denied appellant's claim for wage-loss compensation and her claim that her degenerative lumbar spine condition was work related.

In a November 23, 2012 report, Dr. Obukhoff noted that appellant returned with the results of her October MRI scan of the lumbar spine.⁵ He indicated that she felt that she was unable to go back to work and that physical activity caused increased pain. Dr. Obukhoff related that when appellant "was driving her car, she was hit in an intersection by another vehicle from behind and the bumper was damaged. Apparently she already fixed the problem and is being compensated by insurance of the responsible party; however, she did not report these things to her primary treating physician. [Appellant] is seemingly having more pain in the lower back since the accident. It occurred about two days prior to the last MRI scan." Dr. Obukhoff indicated that most of her trouble was with "lower back pain with leg radiation, although

⁵ An October 24, 2012 MRI scan of the lumbar spine revealed: a 0.5 to 1 millimeter eccentric bulge of annulus to the right and left of midline at L5-S1 minimally narrowing the neural foramina; a one- to two-millimeter broad-based disc protrusion present at L4-L5 associated with congenitally shortened pedicles, facet arthropathy bilaterally, and evidence for bilateral neural foraminal stenoses (and moderate central spinal stenoses at this level); minimal facet effusion on the left side at L3-L4 level; no acute fracture or unstable injury; desiccation of the discs at L4 through S1 without evidence for spondylolysis or spondylolisthesis; a three- to four-millimeter hemangioma of the superior medullary bone of L1 noted as a T1 signal hyperintensity and normal variation and no acute fracture.

radiculopathy symptoms are not as severe.” He diagnosed lumbar spondylolisthesis and lumbar disc degeneration.

Appellant requested reconsideration and submitted a January 9, 2013 report from Dr. Mittleman who disagreed with Dr. Ma that appellant’s work restrictions were based upon degenerative conditions that were not accepted. Dr. Mittleman explained that the work restrictions were based upon the thoracic sprain/strain and the lumbar degenerative joint disease. He noted that there was only one degenerative condition in his report, lumbar facet arthropathy. Dr. Mittleman opined that the aggravation/acceleration of lumbar facet arthropathy was secondary to appellant’s work activities. He further noted that he was unaware that the aggravation of lumbar facet arthropathy was not accepted and would have requested that it be accepted. Dr. Mittleman also believed that aggravation/acceleration of arthropathy should also be accepted. He noted that there were abnormal findings and appellant had residual range of motion limitation. Dr. Mittleman opined that appellant’s work activities were aggravating and accelerating degenerative changes in her lumbar spine.

By decision dated April 11, 2013, OWCP denied modification of the prior decision.⁶ The decision found that appellant’s degenerative conditions were not due to her employment.

Appellant requested reconsideration on April 30, 2013. In a letter dated April 18, 2013, Dr. Mittleman noted his disagreement with OWCP’s decision.

On August 6, 2013 OWCP referred appellant along with a statement of accepted facts, and the medical record to Dr. Anthony F. Fenison, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Ma, the second opinion physician, who opined that appellant had a thoracic and lumbar strain which had resolved and that her arthritis was not work related, and Dr. Mittleman, the attending physician, who found that the accepted conditions remained symptomatic, and that her degenerative spine conditions were accelerated by her work and caused partial disability.

In a September 18, 2013 report, Dr. Fenison noted appellant’s history of injury and treatment. On lumbosacral spine examination, the pelvis was level; there was no loss of the normal lumbar lordosis, there was no tenderness about the paralumbar musculature; and there were no muscle spasms. Gait was normal and sensation was intact. Dr. Fenison diagnosed chronic lumbar spine myofascitis superimposed upon degenerative disc and joint disease, and a hemangioma in L1 and C1. He explained that appellant had a slip and fall injury in September 2011 and received intermittent medical care for the last few years. Dr. Fenison stated that she currently had no subjective complaints and her physical examination was normal. He indicated that appellant had no residuals and no objective evidence as to why she could not return to her usual duties. Dr. Fenison explained that she did not require acute orthopedic intervention as her condition was totally stabilized. He determined that appellant had age-related degenerative changes based on MRI scan findings and opined that, in the absence of any significant or other orthopedic pathology, her “injury should have been treated and stabilized within approximately three months.”

⁶ On March 31, 2013 appellant retired.

In an attached addendum, Dr. Fenison noted that the initial diagnoses of thoracic and lumbar spine sprain/strain were appropriate. He opined that appellant's soft tissue injuries resolved without residuals and that he did not believe that the arthritic components were caused or aggravated by the September 2011 work incident. A December 2011 MRI scan showed lower lumbar degenerative changes that were unchanged from an MRI scan that was done earlier in 2011. Dr. Fenison determined that this evidence suggested that the multilevel degenerative disc and joint disease was present prior to the September 2011 incident. He stated that there were no other work-related conditions. Dr. Fenison noted that appellant had a slip and fall injury that obviously caused her to strain her core musculature while attempting to keep herself from falling and that this was the most direct reason for the soft tissue injury to the thoracolumbar paraspinal musculature.

Dr. Fenison opined that it was "quite possible that the mechanism of injury might have caused a flare up of the preexisting degenerative disc and joint disease, but that temporary flare up should have resolved within approximately 6 to 12 weeks and therefore I would say that by the time the patient had the MRI scan on January 11, 2012 that the arthritic component that was previously documented should have returned back to its baseline level." He reiterated that appellant needed no additional treatment, that her symptoms were completely resolved, and that she did not require any work restrictions. Dr. Fenison opined that "[i]f she had not retired in January 2013, it would be my opinion that she could return back to work performing her full and normal duties without any work restrictions."

In a November 1, 2013 decision, OWCP denied modification of the prior decision. It found that the report of Dr. Fenison, resolved the conflict and established that all of appellant's accepted conditions had resolved and that she did not have a permanent aggravation of her underlying degenerative condition. Also on November 1, 2013 OWCP proposed to terminate appellant's compensation benefits as the weight of the evidence, based upon the report of Dr. Fenison, established that the accepted work-related conditions and any disability from work had ceased. Appellant was given 30 days to submit additional evidence or argument.

OWCP received a November 21, 2013 report from Dr. Mittleman, who advised that appellant could work modified duty. Appellant resubmitted various earlier medical reports.

On January 14, 2014 appellant requested reconsideration. On January 16, 2014 appellant's representative also requested reconsideration. He argued that the decision was based on an erroneous medical report and that she never received back pay from March 1, 2012 until she retired. Appellant's representative also argued that Dr. Fenison agreed that appellant had a temporary exacerbation.

By decision dated January 24, 2014, OWCP terminated appellant's compensation benefits effective that date on the grounds that she had no continuing residuals of her work injury.

On January 27, 2014 appellant requested reconsideration. On March 26, 2014 OWCP also received a letter dated December 10, 2013 from appellant's representative which requested reconsideration. Appellant's representative argued that the decision was erroneous because she was not requesting continued benefits or reinstatement of benefits, but rather, she was requesting

reimbursement of lost wages she never received beginning March 12, 2012. OWCP received a copy of the January 9, 2013 report from Dr. Mittleman.

By decision dated April 17, 2014, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁸ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁹ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹⁰

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹¹ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹²

ANALYSIS

OWCP accepted that appellant sustained thoracic and lumbar strains. After appellant claimed wage-loss compensation and a worsening condition, it referred her to Dr. Ma who determined that the accepted conditions had resolved and that her degenerative conditions were not employment related. OWCP then determined that a conflict of medical opinion existed between Dr. Ma and Dr. Mittleman, the treating physician, who indicated that the accepted conditions had not resolved and found that the degenerative spine conditions were accelerated by work factors and should be accepted. Therefore, it referred appellant to Dr. Fenison, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

⁷ *Curtis Hall*, 45 ECAB 316 (1994).

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁹ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

¹⁰ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹¹ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

¹² *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

In his September 18, 2013 report, Dr. Fenison noted appellant's history, reviewed the medical record and examined her. He advised that she had no subjective complaints and her physical examination was normal. Dr. Fenison diagnosed chronic lumbar spine myofascitis superimposed upon degenerative disc and joint disease and a hemangioma in L1 and C1. He indicated that appellant had no residuals of the accepted conditions and there was no objective evidence as to why she could not return to her usual duties. Dr. Fenison determined that she had age-related degenerative changes that were noted on MRI scan and, in the absence of any other significant pathology, her condition should have "stabilized within approximately three months." He explained that appellant's soft tissue injuries resolved without residuals and that he did not find that the arthritic components were related to the work incident, citing MRI scans from 2011 to support his opinion. Dr. Fenison determined that this evidence suggested that the multilevel degenerative disc and joint disease were present prior to the September 2011 incident and there was no reason to suggest that her usual work activities exacerbated the age-related degenerative changes. He explained that there were no other conditions related to the work injury. Dr. Fenison concluded that appellant had a slip and fall injury that caused her to strain her core musculature which resulted in a soft tissue injury to the thoracolumbar paraspinal musculature. He opined that it was "quite possible that the mechanism of injury might have caused a flare up of the preexisting degenerative disc and joint disease" but any temporary flare up should have resolved within about 6 to 12 weeks. Dr. Fenison opined, based on MRI scan findings, that the arthritic component that was previously documented should have returned back to its baseline level. He opined that no additional treatment was needed, her symptoms were completely resolved, and that she did not require any work restrictions.

The Board finds that Dr. Fenison's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Fenison also found no basis on which to attribute her degenerative spine condition to her employment.¹³ He examined appellant, reviewed her medical records, and reported an accurate history. Because appellant no longer has residuals or disability related to her accepted employment condition, the Board finds that OWCP met its burden of proof to terminate compensation benefits.

Subsequent to the notice proposing to terminate appellant's benefits, OWCP received a November 21, 2013 report from Dr. Mittleman, who advised that appellant could work modified duty. The Board notes that Dr. Mittleman had been on one side of the conflict in the medical opinion that the impartial specialist resolved, and his report is insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.¹⁴

The Board finds that, at the time OWCP terminated benefits, the weight of the medical evidence rested with Dr. Fenison, who submitted a thorough medical opinion based upon a complete and accurate factual and medical history. Dr. Fenison performed a complete

¹³ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

¹⁴ *Barbara J. Warren*, 51 ECAB 413 (2000); *Alice J. Tysinger*, 51 ECAB 638 (2000).

examination, reviewed the record and advised that appellant had no continued disability from her accepted employment injuries and that she was capable of performing her usual employment and that further medical treatment was unnecessary.

The Board finds that Dr. Fenison's report established that appellant ceased to have any disability or condition causally related to her employment injuries, thereby justifying OWCP's January 24, 2014 termination of compensation benefits.

Appellant may submit evidence or argument with a written request for reconsideration within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁵ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁶

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁷

ANALYSIS -- ISSUE 2

Appellant disagreed with the January 24, 2014 decision and timely requested reconsideration on January 27, 2014. On March 26, 2014 OWCP also received appellant's representative's December 10, 2013 request for reconsideration. The underlying issue on reconsideration is medical in nature, whether OWCP properly terminated appellant's compensation and medical benefits effective January 24, 2014.

Appellant's representative argued that the decision was erroneous because she was not requesting continued benefits or reinstatement of benefits, but rather, she was requesting

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.606(b).

¹⁷ *Id.* at § 10.608(b).

reimbursement of lost wages she never received for the period March 12, 2012 until she retired. The Board notes that reimbursement of wage loss was not the issue in the January 24, 2014 decision. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁸ Appellant also did not submit new medical evidence on reconsideration. Although she submitted Dr. Mittleman's January 9, 2013 report, this report is not new and relevant as it was previously of record.¹⁹

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

On appeal, appellant's representative argued that appellant was not requesting a claim for degenerative disease but that she was requesting compensation for back pay. The Board notes that the issue of wage loss for the closed period of time related to the CA-7 claims for disability has not been addressed by OWCP subsequent to its October 24, 2012 decision, even though appellant sought reconsideration of this matter. Upon return of the case, OWCP should issue a formal decision related to the claims for wage loss prior to the termination of benefits.

Appellant's representative also argued that Dr. Mittleman reviewed Dr. Fenison's September 18, 2013 report, and noted that he had examined appellant six months after her dorsal tissue became asymptomatic. He argued that this was not the correct sequence to examine a patient after she healed. Appellant's representative also indicated that appellant had retired on January 31, 2013. The Board notes that Dr. Fenison provided results on examination and found appellant had no residuals of her work-related condition. As the impartial medical examiner, Dr. Fenison was afforded the weight of the medical evidence and the Board has affirmed his findings.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation and medical benefits effective January 24, 2014. The Board also finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

¹⁸ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁹ *James W. Scott*, 55 ECAB 606 (2004) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the April 17 and January 24, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 22, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board